Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

(3)

No. 95-962

In the Supreme Court of the United States

OCTOBER TERM, 1995

CSX TRANSPORTATION, INC., ET AL., PETITIONERS

v.

JANET FRITSCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly exercised jurisdiction over a petition for review of the Interstate Commerce Commission's refusal to reopen a final administrative decision.

2. Whether the court of appeals erred in holding that a railroad could effectuate an abandonment of a rail line notwithstanding the Interstate Commerce Commission's imposition of a public use condition for a 180-day period.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 59 F.3d 248.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. Petitions for rehearing were denied on September 18, 1995. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on December 18, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns a rail abandonment proceeding before the former Interstate Commerce Commission (ICC).[1] On January 25, 1993, petitioner CSX Transportation, Inc. (CSX) filed a "notice of exemption" to abandon an "out-of-service" rail line that it had operated between Bloomington and Bedford, Indiana. See Pet. App. 18a-20a. On February 1, 1993, petitioner Monroe County Parks and Recreation Department (Monroe County) notified the ICC that it was interested in using the line for interim trail use under Section 208 of the National Trails System Act Amendments of 1983, Pub. L. No. 98-11, 97 Stat. 48, 16 U.S.C. 1247(d) (Trails Act).[2] Monroe

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[1] On December 29, 1995, the President signed Pub. L. No. 104-88, 109 Stat. 803, "The ICC Termination Act of 1995" (ICCTA). That statute abolished the ICC and transferred many of its rail functions to the Surface Transportation Board (STB), effective January 1, 1996. However, the new Act does not affect suits commenced before its effective date where, as here, the suit involves functions transferred to the STB. See ICCTA Section 204(c)(2). The functions at issue in this proceeding, which were formerly performed by the ICC, are now vested in the STB by virtue of 49 U.S.C. 10903 and 10905, as reenacted in the ICCTA. Section 204(a) of the ICCTA provides that all regulations previously issued by the ICC "shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the" STB. This brief will refer to the ICC and to the provisions of the Interstate Commerce Act as they existed prior to the enactment of the ICCTA. However, we request that the records in this case be changed to substitute the STB for the ICC as a respondent in this proceeding.

[2] The Trails Act directs the Commission not to permit abandonment where a State, political subdivision, or qualified private organization is prepared to assume full responsibility

County requested that the ICC impose a public use condition under 49 U.S.C. 10906[3] to give it additional time to pursue a trail use agreement with CSX. See Pet. App. 3a, 41a. On February 16, 1993, the ICC published a notice of the abandonment proposal in the *Federal Register*. See 58 Fed. Reg. 8635 (1993). The notice specifically alerted the public that (1) requests for trail use and/or public use conditions could be made and (2) environmental, historic preservation,

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for management of such rights-of-way and for any legal liability arising out of such "interim use" as a trail; that policy serves "to preserve established railroad rights-of-way for future reactivation of rail service." 16 U.S.C. 1247(d). Section 1247(d) provides that interim trail use "shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." See *Preseault* v. *ICC*, 494 U.S. 1, 6-9 (1990). The Trails Act was not changed in the ICCTA.

[3] Former 49 U.S.C. 10906 (1988) provided in pertinent part:

> When the [ICC] finds [that abandonment or discontinuance is to be permitted], the Commission shall find further whether the rail properties that are involved in the proposed abandonment * * * are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

The ICCTA public use provision (Section 10905) is similar but adds that proposals for "continued rail operations" will take priority.

public use and/or trail use conditions would be imposed, where appropriate, in a subsequent decision. The authority to abandon was scheduled to take effect in March 1993, unless stayed pending reconsideration. See Pet. App. 18a-20a.

In a submission dated March 16, 1993, CSX informed the ICC that it had decided not to negotiate a trail use agreement with Monroe County. On March 18, 1993, the ICC issued a decision (served on March 22), indicating that it was unable to impose a trail use condition at that time, due to CSX's unwillingness to consider trail use. See Pet. App. 41a-44a.[4] To permit additional time for consideration of public use options, the ICC imposed a 180-day public use condition. *Ibid.* On March 23, 1993, CSX wrote to the ICC indicating that it had "abandoned" the line. See *id.* at 4a. Nevertheless, CSX and Monroe County negotiated for the next several months concerning possible use of the right-of-way as a trail. See *id.* at 22a-23a. On September 14, 1993, just before the 180-day period expired, CSX again wrote to the ICC, stating that it had reached an agreement with Monroe County for interim trail use. See *id.* at 5a. CSX asked the ICC to reopen the abandonment proceeding and to issue a Notice of Interim Trail Use (NITU) to permit the trail use. See *id.* at 4a-5a.[5]

By decision served on September 27, 1993, the ICC imposed the trail condition. Pet. App. 21a-24a. In its

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[4] Trail conditions may not be imposed without the full consent of the railroad. See *National Wildlife Federation* v. *ICC*, 850 F.2d 694, 699-702 (D.C. Cir. 1988).

[5] The ICC issues an NITU when a prospective trail user has requested an interim trail use arrangement and the carrier has indicated its willingness to negotiate such an arrangement. See *Preseault*, 494 U.S. at 7 n. 5.

decision, the ICC found that it retained authority to impose a trail condition because it had maintained jurisdiction over the property while the public use condition was in force. *Id.* at 23a. No petition for judicial review of that decision was filed within the 60-day period established by statute for the initiation of judicial challenges to ICC decisions.[6]

On November 8, 1993, 43 days after service of the ICC order imposing the trail condition, 18 landowners (including Victor Oolitic Stone Company, one of the petitioners below), purporting to act for themselves and others similarly situated, moved for administrative reconsideration of the ICC order. Pet. App. 37a-40a.[7] The motion for reconsideration was untimely under ICC rules, which allow a maximum of 40 days for the filing of motions seeking reconsideration of rail abandonment decisions. 49 C.F.R. 1115.3; see Pet. App. 6a-7a. The ICC denied reconsideration by decision issued on March 22, 1994. *Id.* at 28a-36a. The landowners then petitioned for review of the March 22 refusal to reopen the proceeding.

2. On review of the refusal to reopen, the court of appeals reversed the ICC's decision to impose a trail condition. Pet. App. 1a-13a. The court first rejected the intervenors' challenge to its jurisdiction. *Id.* at 6a-9a. The court acknowledged the jurisdictional

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[6] Under 28 U.S.C. 2344, a provision of the Hobbs Act, any "party aggrieved by the final order [of the ICC or, now, the STB] may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies."

[7] The ICC also received a number of letter protests in late September 1993. Because those letters were not served on parties to the proceeding and omitted required elements of motions for reconsideration, they were added to the ICC file as letter protests. See Pet. App. 25a-27a.

limitation imposed by *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270 (1987) (*Locomotive Engineers*), which held that where a party seeks reconsideration of a prior agency order on the ground of "material error," the agency's denial of reconsideration is not subject to judicial review.[8] The court of appeals distinguished *Locomotive Engineers* on the ground that the landowners' petition to reopen the ICC's abandonment decision had been based on "non-pretextual grounds of new matter or changed circumstances, and not merely on [allegations of] material error in the original agency decision." Pet. App. 8a (citing *Locomotive Engineers*, 482 U.S. at 281).

The court of appeals next considered the landowners' challenge to the ICC's authority to impose a trail condition based on the agreement reached between CSX and Monroe County. The court again found for the landowners, ruling that the ICC's jurisdiction had ended in March 1993, when CSX initially claimed to have abandoned the disputed rail line. The court determined that neither the 180-day public use condition imposed under 49 U.S.C. 10906 nor any other provision of the ICC's March 18 order

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[8] As the court of appeals observed (Pet. App. 6a), the petition for review here, filed May 19, 1994, was well outside the 60-day period established by 28 U.S.C. 2344 for seeking review of the ICC's September 27, 1993, decision to issue an NITU. It was, however, filed within 60 days of the Commission's March 22, 1994, order denying the landowners' motion for reconsideration.

had limited CSX's authority to consummate abandonment. Pet. App. 9a-13a.[9]

ARGUMENT

We agree with petitioners that this case was wrongly decided by the court of appeals. The court misapplied this Court's decision in *Locomotive Engineers* and misconstrued 49 U.S.C. 10906 (now 49 U.S.C. 10905). Further review of the issues raised here, however, does not appear warranted at this time.

1. The court of appeals erred in ruling that it had jurisdiction to review the ICC's decision.[10] This Court in *Locomotive Engineers* distinguished between an agency's denial of a petition to reopen based upon a claim of "'material error' in the original agency decision" (which is not judicially reviewable) and denial of a petition to reopen based upon a claim of "new evidence or changed circumstances" (which is subject to judicial review). 482 U.S. at 278-279. Acknowledging that "the question may be a close one" (Pet. App. 9a), the court of appeals ruled (*id.* at 8a) that the landowners presented "new material" within the meaning of *Locomotive Engineers* in their petition for reconsideration. That conclusion was incorrect. The only argument for reconsideration presented in the landowners' November 8, 1993, motion to reconsider concerned the ICC's allegedly erroneous assertion of authority to impose a trail

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[9] An authorized abandonment, once fully exercised or "consummated," removes the line from the national transportation system. See *Preseault*, 494 U.S. at 5-6 n. 3.

[10] Although the government did not contest the court of appeals' jurisdiction in its brief to the court of appeals panel, see Gov't C.A. Br. 1, we now agree with petitioners that the court lacked jurisdiction.

condition after CSX had informed the ICC that it had "abandoned its common carrier obligations in the railroad corridor on or about March 19, 1993." *Id.* at 38a. Thus, the petition for reconsideration raised neither new evidence nor changed circumstances; it simply alleged that the ICC's decision to impose a trail condition was unlawful *at the time it was made.* Under *Locomotive Engineers*, the petition for review should therefore have been dismissed.

The court of appeals concluded that "the Commission was in fact presented with new material accompanying the motion to reopen. Specifically, [the landowners] asserted before the Commission that they were denied the opportunity to submit protests, arguing that CSX's request to reopen the proceeding was made beyond the Commission's procedural deadlines to file protests, and that [the landowners] were unaware of the filing of the CSX motion." Pet. App. 7a-8a (footnote omitted). Even if we assume that an interested party's belated awareness that a matter is before an agency might sometimes constitute "new material" or "changed circumstances" within the meaning of *Locomotive Engineers*, the court of appeals erred in exercising jurisdiction here. The ICC's February 16, 1993, *Federal Register* notice specifically alerted the interested public that "trail use\rail banking conditions could be imposed in a later decision." Pet. App. 20a.[11] The Commission's regula-

[11] It is well settled that publication in the *Federal Register* provides legally sufficient notice to all interested or affected persons, regardless of actual knowledge or hardship resulting from ignorance. See, *e.g.*, *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986) (*Federal Register* notice adequate to publicize the availability of certain low interest loans); *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384-385 (1947) (wheat crop insur-

tions provide that "[i]nterested persons may become parties to an abandonment or discontinuance proceeding by filing written comments or protests with the Commission." 49 C.F.R. 1152.25(a). Those regulations also require that "[e]very document filed with the Commission" must be served "upon all parties to the proceeding." 49 C.F.R. 1104.12(a). Having declined to become parties to the abandonment proceeding, the landowners should not have been permitted to invoke their belated awareness of CSX's September 14, 1993, filing as "new material" or a "changed circumstance."

Even if the belated discovery of the September 14, 1993, filing were deemed to be reasonable, moreover, the landowners had ample opportunities to protect their rights. A *timely* petition for reconsideration would have tolled the time for seeking judicial review of the September 27, 1993, NITU itself.[12] See *Locomotive Engineers*, 482 U.S. at 279, 284. Alternatively, the landowners might have sought judicial review within the 60-day period after the September 27, 1993, NITU, since the filing of a request for agency recon-

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ance regulations were binding after insured's *Federal Register* publication regardless of actual knowledge of the regulations). Accord 44 U.S.C. 1507 (publication in *Federal Register* "is sufficient to give notice of the contents of the document to a person subject to or affected by it"); *Friends of Sierra RR* v. *ICC*, 881 F.2d 663, 667-668 (9th Cir. 1989), (*Federal Register* notice legally sufficient in ICC exempt abandonment proceeding), cert. denied, 493 U.S. 1093 (1990).

[12] The motion for reconsideration stated that the relevant events "were only recently discovered by the Class of adjacent property owners," Pet. App. 39a, but did not assert that the information had been discovered so "recently" as to preclude timely filing of a petition for reconsideration.

sideration is not a prerequisite to a petition for judicial review. See *id.* at 284-285. The need to seek judicial review of the agency's refusal to reopen arose only because the landowners failed to exercise either of those options.

Despite the court of appeals' error, there appears to be no compelling need for this Court's review at the present time. The practical effect of the court's error is likely to be limited. The court of appeals cited and purported to apply *Locomotive Engineers*. Its misapplication of *Locomotive Engineers* was based on its evaluation of the facts presented to it regarding the abandonment of this particular railroad line. See Pet. App. 7a-8a.

2. The court of appeals also erred in holding that the ICC's imposition of a public use condition under Section 10906 did not prevent the railroad from abandoning the disputed line. Since its enactment in 1976, Section 10906 has been an important tool in providing time for interested parties to attempt to acquire rail rights-of-way for public purposes through arm's length negotiations. Since 1986, the ICC has interpreted Section 10906 to permit it to bar the railroad from disposing of the right-of-way for up to 180 days, pending voluntary negotiations for interim trail use.[13] The court of appeals erred in substituting its own interpretation of Section 10906 for the reasonable, long-standing interpretation of the agency charged with administering the statute.

Contrary to the court of appeals' view, the language of Section 10906 is broad enough to support the ICC's

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[13] *Rail Abandonments - Use of Rights-of-Way as Trails*, 2 I.C.C.2d 591, 609 (1986) (Section 10906 applies to easements as well as property owned in fee by the railroad).

construction. Under Section 10906, if the ICC authorizes an abandonment, it must determine whether the rail properties "are suitable for use for public purposes, including * * * recreation." If the ICC determines that use for public purposes may be suitable, the ICC has the authority to bar the sale, lease, exchange, or any other disposition of the rail properties involved for up to 180 days, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

Thus, Section 10906 permits the ICC to prohibit *any* disposal of the rail properties (*i.e.*, to require the railroad to keep the transportation corridor intact) for up to 180 days pending negotiations for public use (including trail or other recreational use).[14] Nothing in the language of Section 10906 compels the court of appeals' conclusion that public use conditions cannot forestall legal abandonment of a rail line where reversionary interests may be involved. Unlike *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 633-634 (1984), which held that the consummation of *unconditioned* abandonment authority removes the property from the ICC's control, after which it may be dealt with by state and local jurisdictions in the same manner as other property within their borders, the property at issue

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[14] Indeed, this is confirmed by the legislative history of the ICCTA, which explains (H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 181-182 (1995)) (emphasis added):

> In replacing former Section 10906, this provision retains existing agency authority to examine the possibility that a line proposed for abandonment may be suitable for alternative public uses. *Abandonment may be postponed for up to 6 months to allow for the pursuit of such alternatives.*

in this proceeding was the subject of an unexpired public use condition.

Notwithstanding the defect in the court's construction of Section 10906, we see no compelling need for further review at this time. The court's ruling, which is largely fact-bound (see Pet. App. 11a-12a), does not present an issue of sufficient general importance to warrant review by this Court at this point. The impact of the court's ruling likely will be limited because parties seeking to ensure interim trail use have an alternative remedy: invoking the Trails Act *during* the abandonment proceeding. Under the regulatory procedures implementing 16 U.S.C. 1247(d), when a prospective trail user requests an interim trail use arrangement and the carrier indicates its willingness to negotiate such an arrangement, the ICC (now the STB, see note 1, *supra*) issues an NITU. 49 C.F.R. 1152.29(d). When an NITU is issued, the parties have a 180-day period in which to negotiate an interim trail use arrangement. If no agreement is reached, the NITU automatically con–verts into an effective certificate authorizing abandonment. In turn, if a trail use agreement is reached, it is automatically authorized by the NITU. Moreover, a railroad wishing to consider trail use can avoid the effect of the court of appeals' decision by simply refraining from submitting a letter declaring that it has abandoned the line of railroad. See Pet. App. 11a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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